

**DYKEMA GOSSETT** PLLC

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**W. Alan Wilk**

Direct Dial: (517) 374-9122

Email: WAWILK@DYKEMA.COM

September 14, 2004

**Overnight Courier/Mail**

Mr. Jeff Jordan, Esq.  
Federal Election Commission  
General Counsel's Office  
999 E. Street N.W.  
Washington, DC 20463

Re: MUR 5488

Dear Mr. Jordan:

Enclosed please find a memorandum in response to the above referenced complaint with exhibits. A copy was also sent this date electronically to Alva Smith.

Please call if you have questions.

Very truly yours,

**DYKEMA GOSSETT** PLLC

*W. Alan Wilk (6/5)*

W. Alan Wilk

Enclosure

cc: Alva Smith (via email)  
Bradley L. Smith  
James L. Bailey

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2004 SEP 20 A 9:29

**FEDERAL ELECTION COMMISSION**

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In re MUR 5488

Brad Smith for Congress Committee,  
James Bailey, Treasurer  
Respondents

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**MEMORANDUM IN RESPONSE TO COMPLAINT**

25044114073

The referenced complaint alleges that the Brad Smith for Congress Campaign Committee (the "Committee") and its treasurer, James Bailey, violated the Act by accepting individual contributions in excess of \$2000. The recently enacted "millionaire's amendment" allows Smith's Committee to accept the increased contributions. Accordingly, the General Counsel should find there is no reason to believe that a violation has been committed and dismiss the complaint in this matter.

**I. FACTS**

**A. Background and Mr. Smith's Loans to his Campaign**

Brad Smith was one of six candidates running in the Republican primary for election to Congress in Michigan's seventh district. One of his opponents, Gene DeRossett, personally financed much of his campaign. Another opponent, Joe Schwarz, ultimately won the primary election on August 3, 2004.

Mr. Smith personally lent his Committee \$100,000 on September 30, 2003. On March 31, 2004, he lent the committee another \$40,000, bringing the total to \$140,000. (See qtr report FEC-122280, schedule C line 10).

**B. Mr. DeRossett's Notice under the Millionaire's Amendment**

On April 19, 2004, one of Mr. Smith's opponents, Gene DeRossett, faxed FEC form 10 to the Commission disclosing that he had personally expended \$451,000. (See Form 10, Ex. A). DeRossett reported the same information in his quarterly FEC report filed April 15.

The treasurer of the DeRossett committee stated in a June 2 letter to the FEC that "the DeRossett for Congress Committee notified the opposing candidates [of DeRossett's expenditure of \$451,000 in personal funds] on April 19, 2004." Ex. B. Neither Mr. Smith, his treasurer, nor his campaign staff can verify whether this statement is true. When Mr. Smith became aware of the Form 11 filing requirement in May, he and his staff attempted but failed to locate Mr. DeRossett's Form 10 in Smith's campaign headquarters. Neither Mr. Smith nor his Committee treasurer, Mr. Bailey, has ever seen a Form 10 transmitted from DeRossett's committee. Smith did not see the form until sometime in May when he viewed it as an image on the FEC website.

**C. Big Endorsement Leads to Partial Loan Repayment**

On April 19, 2004, Mr. Smith received exciting news that the Club for Growth, an influential political organization, was endorsing him. See 4/20/04 press release, Ex. C.<sup>1</sup> The news spurred intense activity within campaign headquarters, and many incoming and outgoing faxes, because the endorsement would likely produce further endorsements and substantially increased individual contributions to his campaign.

A day or so later, Mr. Smith decided that his Committee could prudently repay part of his loan and still have sufficient money for campaign expenditures. On April 22, 2004, Mr. Smith requested that his treasurer repay him \$50,000. Repayment Demand, Ex. D. The next day, his treasurer cut a check for that amount, leaving a loan balance of \$90,000. (See qrt report FEC-127669, schedule B line 19a). (This balance remains owing today.)

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<sup>1</sup> The timing of Club for Growth's endorsement and Mr. DeRossett's filing of Form 10 with the FEC was a complete coincidence.

Mr. Smith's request to be repaid \$50,000 from his Committee was not motivated in any way by eligibility under the millionaire's amendment. See Smith affidavit Ex. E. Mr. Smith requested partial repayment on April 22 only because a new endorsement meant his campaign no longer needed the entire \$140,000.

**D. Smith Files Form 11 with FEC**

In late May 2004, Mr. Smith learned of the requirement that he file Form 11, the "notice of opposition personal funds amount" (henceforth the "OPF amount"). Having been partially repaid April 22, Mr. Smith's aggregate personal expenditures on his campaign consisted of the \$90,000 his Committee owed him. Using this amount, he calculated that the OPF amount was \$361,000, making him eligible for increased contributions under the millionaire's amendment. On June 11, Mr. Smith signed and faxed Form 11 to the FEC.<sup>2</sup>

**E. Schwarz Campaign Files FEC Complaint**

John Truscott was and is John Schwarz's principal campaign consultant. On June 30, 2004, Mr. Truscott signed the complaint letter at issue and disseminated it to the media.<sup>3</sup> On July 31, Smith's campaign received Mr. Truscott's complaint from the FEC. (The date-receipt stamp shows that the FEC inexplicably did not receive Mr. Truscott's complaint letter until July 21, 2004.) Mr. Bailey sought and received an extension to respond to the complaint until September 14, 2004.

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<sup>2</sup> On June 11, Mr. Smith was unsure of the date he or his campaign received notice of DeRossett's Form 10. Mr. Smith simply viewed a copy of DeRossett's Form 10 on the FEC website and transferred the amount and date which appeared to his Form 11. Today, he is increasingly doubtful that his campaign received an actual faxed copy of Form 10.

<sup>3</sup> News media immediately ran stories prominently reporting Truscott's allegations. Schwarz's supporters later saturated TV with attack ads based on the complaint.

## II. LEGAL RESPONSE

Mr. Smith calculated the OPF amount based on the aggregate amount of personal funds he had expended on his campaign at the time he signed Form 11. This calculation was correct under any reasonable construction of the applicable law.

The instructions and worksheet for Form 11 state that the candidate should first enter the amount from Line 12 of an opposing candidate's most recent FEC Form 10, then subtract "the amount of personal funds expended by the candidate as of the date of receipt of the most recently filed FEC Form 10." The difficulty was in choosing the date of receipt of DeRossett's Form 10. Mr. Smith could assume that his campaign had received DeRossett's Form 10 on April 19 (the date of the Treasurer's fax appearing on the FEC website), or he could use the date his campaign first viewed DeRossett's Form 10 in May, on the FEC website. If he used the amount of his loan as of April 19 (\$140,000) the Form 11 worksheet would yield an OPF amount of \$311,000. However, if he used the \$90,000 loan amount owing on the date he actually received notice of DeRossett's Form 10, the worksheet yielded an OPF amount of \$361,000.

Mr. Smith consulted the regulations, the statute, and Appendix F of the May 2004 FEC Guide for further guidance. The regulations provided some guidance, anticipating circumstances where a committee might receive "constructive notification" of Form 10 and defining this to mean the date a candidate obtains a copy of FEC Form 10 received by the Commission 11 CFR §400.30(d). He also sought informal advice from a Washington-based election attorney and a Senior Campaign Finance Specialist at the FEC.

Nothing in these legal resources supported retrospectively reporting the amount of personal funds he had expended seven-weeks prior. Indeed, doing so would significantly misrepresent what Mr. Smith had actually expended on his campaign. Moreover, it would undermine the policy of the amendment: to allow candidates with lower personal expenditures

on their campaigns to “catch up” with wealthier opponents who have invested heavily in their own campaigns. The circumstances of Mr. Smith’s campaign and the heavy spending by Mr. DeRossett fell squarely within the purposes of the amendment.

Of all the resources Mr. Smith consulted, the statute’s own definition of the OPF amount proved the most helpful:

- (2) Determination of opposition personal funds amount
- (A) In general  
The opposition personal funds amount is an amount equal to the excess (if any) of
  - (i) the greatest aggregate amount of expenditures from personal funds (as defined in subsection (b)(1) of this section) that an opposing candidate in the same election makes; over
  - (ii) the aggregate amount of expenditures from personal funds made by the candidate with respect to the election.

2 U.S.C. 441a-1(A)(2). The statute clearly differentiates between the measurement of expenditures made by the opponent by the candidate. The OPF amount is the difference between “*the greatest aggregate amount*” of personal funds expended by the opponent minus “*the aggregate amount*” of personal funds expended by the candidate.<sup>4</sup>

It is very significant that Congress omitted the term “greatest” for purposes of aggregating a candidate’s personal funding of his campaign. The difference in terminology instructs candidates (and the Commission) to reach further when calculating an opponent’s personal funding, but to exercise more restraint when determining the amount of a candidate’s personal funding. *The more limited reach for calculating the candidate’s personal expenditures suggests that the millionaire’s amendment is weighted in favor of allowing its application.*

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<sup>4</sup> Inexplicably, the regulation does not differentiate between the two measurements. The regulation instructs one to compute the OPF amount (in these circumstances) by subtracting “the greatest aggregate amount” of personal funds expended by the opponent minus “the greatest aggregate amount” of personal funds expended by the candidate. 11 CFR §400.10(a)(3)(ii) and 400.10(b). Where a statute conflicts with an agency rule or regulation, the statute must control. Estate of Cowart v. Nicklos Drilling Co., 112 S.Ct. 2589, 2594 (1992) (“Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms.”).

### **III. MULTIPLE SOURCES DEMONSTRATE THAT NO VIOLATION OCCURRED.**

First, Mr. Smith does not know when, or even if, his campaign received Form 10. The worksheet instructions for Form 11 did not anticipate such questions. Mr. Smith acted consistent with the letter of the regulations by using the date he received “constructive notice” of DeRossett’s Form 10 by viewing a copy on the FEC website.

Second, the Commission’s most recent guidance on the millionaire’s amendment advises candidates to perform a straightforward comparison of “opponent-versus-candidate personal expenditures” to calculate the OPF amount. May 2004 Candidate Guide, Appendix F. This resource indicated that Smith’s Committee had qualified for increased contribution levels under a basic calculation comparing up-to-date personal expenditures.

Third, the regulations governing the millionaire’s amendment do not support retroactively determining the personal expenditure amount, especially if such a retrospective produces an inaccurate (false) report to the FEC. Indeed, the regulations explicitly contemplate different notification dates depending on whether the candidate received actual or constructive notice of Form 11. Mr. Smith’s Committee is eligible for increased contribution limits using the date he received an actual copy of Mr. DeRossett’s Form 10 in May, 2004, *i.e.* (the date he received constructive notification pursuant to 11 CFR 400.30(d)).

Fourth, the statute itself strongly suggests that when calculating an OPF amount, candidates (and the Commission) should not apply the statute or regulations in a strained manner that overstates the amount of a candidate’s actual personal expenditures. The millionaire’s amendment clearly measures “personal funds expended by an opponent” differently from “personal funds expended by a candidate.” The statute does not reach as far when measuring personal funds expended by the candidate vis-à-vis his opponent. This differentiation results in

more generous determinations of a candidate's eligibility for increased contribution limits under the millionaire's amendment.

Finally, Mr. Smith's calculation of the OPF amount and acceptance of increased contributions is consistent with the spirit and purposes of the millionaire's amendment: to help less wealthy candidates compete on a level playing field against wealthier opponents who largely finance their own campaigns. Its application in these circumstances was manifestly proper.

**IV. MR. SMITH RELIED ON COMMISSION RESOURCES IN GOOD FAITH.**

Mr. Smith relied in good faith on the statute, regulations, and Commission guidance materials to determine his Committee's eligibility to accept increased contribution limits. He also relied on informal advice from an attorney knowledgeable in election law who believed that when a committee changes the amount it owes a candidate (thereby increasing or reducing the aggregate amount of a candidate's personal expenditures), the intent of the law is to require the candidate to assess his actual personal expenditures at the time he files Form 11 to properly calculate the aggregate amount of personal expenditures.

Mr. Smith also relied on the fact that a senior FEC campaign finance specialist, whom he consulted for help in filling out Form 11, did not know what he should do in his circumstances. She expressed neither approval nor disapproval of Mr. Smith's using the amount of his current actual personal expenditures (versus using a seven-week retrospective) to calculate the OPF amount on Form 11. With the FEC advisor silent on the issue, the "weight of authority" and the purposes of the millionaire's amendment indicated that Mr. Smith use the amount of his current actual personal expenditures.

**V. CONCLUDING REMARKS**

Respondents' acceptance of increased contributions was proper. Mr. Smith correctly and accurately calculated his Opposition Personal Funds Amount to be \$361,000 based on the net



amount he had expended on the campaign at the time he had constructive notice of DeRossett's Form 10 and signed Form 11. The statute, regulations, and FEC Candidate Guide support the methodology he used. Most important, Mr. Smith fulfilled the purpose of the statute: to allow him to better compete against a wealthy self-financed opponent.

Mr. Smith used his best efforts to comply with an extraordinarily complex statute, relying in good faith on the rules, regulations, and other campaign finance guidance provided by the Commission. Meanwhile, it is quite clear that his opponent filed this FEC complaint primarily to harass him and to generate negative publicity. The tactic worked. As a result, Mr. Smith was defeated by a small margin, his reputation has been smeared in the community, and he and his meager campaign account face significant legal fees if this complaint is not dismissed. His campaign does not have enough funds to refund contributions made under the increased limits, and there is virtually zero prospect of additional contributions materializing. The limited resources of the Commission and its staff could undoubtedly be better utilized on other cases.

The General Counsel should find that there is no reason to believe that a violation has been committed and dismiss the complaint.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Handwritten signature of W. Alan Wilk in cursive script.

W. Alan Wilk  
124 W. Allegan Street, Suite 800  
Lansing, MI 48933-1742  
(517) 374-9122

September 14, 2004

AA01\132816 2  
ID\BLS

Exhibit

A

25044114886

## FEC FORM 10

24-HOUR NOTICE OF EXPENDITURE FROM CANDIDATE'S PERSONAL FUNDS (11 CFR 400.21 and 400.22)  
(Mandatory Amendment)

|   |                  |          |             |                        |
|---|------------------|----------|-------------|------------------------|
| 1. Name of Candidate                    | 2. Office Sought | 3. State | 4. District | 5. Candidate ID Number |
| C. Gene DeRossett                       | US House         | MI       | 07          | H4M707079              |
| 6. Name of Principal Campaign Committee |                  |          |             | 7. Committee ID Number |
| DeRossett for Congress                  |                  |          |             | C00386060              |

8. Address

PO Box 367

9. City, State and ZIP Code

Saline, MI 48176

10. Expenditures of Personal Funds (If the candidate has made expenditures for official elections, submit a separate Form 10 for each election.)

Aggregate Expenditures Previously Reported During the Election Cycle

\$ 2,100,000.00

| DATE       | ELECTION  | AMOUNT          | CHECK IF CANDIDATE                  |
|------------|---|-----------------|-------------------------------------|
| 10/31/2004 | <input checked="" type="checkbox"/> Primary<br><input type="checkbox"/> General<br><input type="checkbox"/> Other | \$ 2,300,000.00 | <input checked="" type="checkbox"/> |
|            | <input type="checkbox"/> Primary<br><input type="checkbox"/> General<br><input type="checkbox"/> Other            |                 |                                     |
|            | <input type="checkbox"/> Primary<br><input type="checkbox"/> General<br><input type="checkbox"/> Other            |                 |                                     |
|            | <input type="checkbox"/> Primary<br><input type="checkbox"/> General<br><input type="checkbox"/> Other            |                 |                                     |

11. Total Expenditures This Notice

\$ 2,300,000.00

12. Total Expenditures Election Cycle To Date

\$ 4,500,000.00

SIGNATURE OF COMMITTEE TREASURER

Lori Jean Lobbestael

NAME OF COMMITTEE TREASURER

Lori Jean Lobbestael

DATE

4/19/2004

|  |  |  |
|--|--|--|
|  |  |  |
|--|--|--|

For further information contact:  
Federal Election Commission, 999 E Street, NW Washington, DC 20543  
Tel: (202) 453-7500 TDD: (202) 453-7500

FEC Form 10 (Page 08/2000)

Exhibit

B

25044114688

24038422858

**DeRossett for Congress**RECEIVED  
FEC MAIL  
OPERATIONS CENTER

2004 JAN -3 AM 11:21

June 2, 2004

Lesh S. Palmer  
Federal Election Commission  
Washington, D.C. 20463

Dear Ms. Palmer:

This letter is in response to the Federal Election Commission's preliminary review of the filing referenced as Filing dated 4/19/04 under the identification number of CT0386060.

The DeRossett for Congress committee became aware that the committee had reached the threshold of the new Millionaires Amendment and the requirements needed to comply with this new law, on April 19, 2004 the committee immediately filed the same day with the FEC.

In addition to the filing with the Federal Election Commission the DeRossett for Congress Committee notified the opposing candidates and the national party of each opposing candidate on April 19, 2004.

Sincerely,

*Lori Lobbestael*Lori Lobbestael,  
Treasurer

Paid for by DeRossett for Congress

Not printed at government expense  
Post Office Box 367 - Saline, MI 48176

25044114689

Exhibit

C

25044114690

**Smith, Bradley**

**From:** Brad Smith [brad@bradsmithforcongress.com]  
**Sent:** Tuesday, August 31, 2004 12.02 PM  
**To:** Smith, Bradley  
**Subject:** Fw. Brad Smith Endorsed by Club for Growth

----- Forwarded Message -----

From: "Sharon E. Williams" <sharon@bradsmithforcongress.com>  
To: <sharon@bradsmithforcongress.com>  
Sent Tue, 20 Apr 2004 10:35:35 -0400  
Subject: Brad Smith Endorsed by Club for Growth



1776 K Street, NW, Suite 300

Washington, DC 20006

Phone: 202.955.5500

**FOR IMMEDIATE RELEASE**

**April 20, 2004**

**CONTACT: Kevin McVicker**

**Shirley & Banister Public Affairs**

**(703) 739-5920 or (800) 536-5920**

## **BRAD SMITH FOR CONGRESS IN MICHIGAN-7**

**Washington, D.C.**—The political action arm of Club for Growth, a national free-market advocacy organization, today endorsed respected attorney Brad Smith for Congress in Michigan's 7<sup>th</sup> District

“Brad Smith has impressed our members in Michigan and around the country for his strong stand for pro-economic growth issues,” said Club for Growth president Stephen Moore. “As a farmer, businessman and intellectual property attorney, Brad Smith will be an unwavering supporter of lower taxes and smaller government.”

9/9/2004

"Brad Smith's surge in recent polls shows that he has the momentum to win this congressional seat," Mr. Moore said. "Brad will be a star in Congress very much like the retiring Congressman Nick Smith has been over the past 12 years."

The Club for Growth PAC expects that its members will donate total contributions in the six-figure range for Mr. Smith's campaign.

*The Club for Growth was founded in 1999 as a nationwide political membership organization dedicated to advancing public policies that promote economic growth. The organization's PAC forwards campaign contributions from its members to the most free-market oriented candidates in targeted congressional and other races. In the 2000 election cycle the Club for Growth spent \$2.4 million and its PAC helped elect 10 new Republicans to Congress. The Club for Growth has grown over ten-fold to over 16,000 members since the 2000 election cycle and the Club and its members raised or donated over \$10 million and its PAC helped elect seventeen new Members of Congress in the 2002 election cycle.*

**For more information, please contact Kevin McVicker at (703) 739-5920.**

-30-

----- End of Forwarded Message -----

Brad Smith for Congress  
P O. Box 128  
Somerset Center, MI 49282  
(517) 817-2190  
[www.bradsmithforcongress.com](http://www.bradsmithforcongress.com)



Exhibit

D

25044114693

22 April, 2004

To: Jim Backs, Treasurer  
Brad Smith for Congress Committee

From: Brad Smith

Re: \$100,000 Loan dated Sept 30, 2003  
\$40,000 Loan dated March 31, 2004  
140,000

Demand is hereby made for repayment  
of the 3/31/04 loan referenced above  
immediately and in full.

Demand is also hereby made for repayment  
of \$10,000 of Principal owing on the  
9/30/03 loan referenced above.

Balance owing to Brad Smith ~~is~~ will  
thus become \$90,000 after the  
above repayments are made.

Brad Smith

Reggie 50,000 → Sent to Heather  
R.N. - 90,000 (Sharon Took  
to

25044114894

Exhibit

E

250441:4695

**FEDERAL ELECTION COMMISSION**

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In re MUR 5488

Brad Smith for Congress Committee,  
James Bailey, Treasurer  
Respondents

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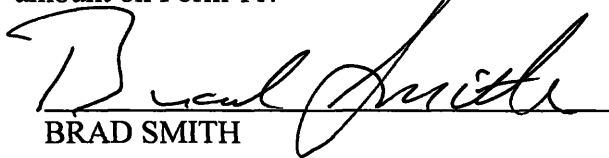
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**AFFIDAVIT OF BRAD SMITH**

1. My name is Brad Smith. My address is 14191 Calhoun Road, Addison, Michigan, 49220. I have personal knowledge of the following and am competent to testify thereto.
2. I do not know when, or even whether, my campaign received a Form 10 notice transmitted from the Gene DeRossett for Congress Committee. I have never seen a Form 10 transmitted from DeRossett's committee. I did not see the form until sometime in May when I viewed it as an image on the FEC website. On information and belief, my treasurer has never seen DeRossett's form 10 in any form.
3. When I became aware of the Form 11 filing requirement in May, my staff and I attempted but failed to locate Mr. DeRossett's Form 10 in my campaign headquarters.
4. On April 19, 2004, I learned that I had been endorsed by the Club for Growth. The news generated intense activity within campaign headquarters, including many incoming and outgoing faxes. The endorsement meant that my campaign would likely receive additional important endorsements as well as many individual and PAC contributions that I otherwise would not have received.
5. On April 21 or 22, 2004, I decided that with the Club for Growth endorsement, my campaign could afford to pay me back \$50,000 of my \$140,000 loan and still have sufficient money for anticipated campaign expenditures. On April 22, 2004, I signed a demand requesting that my treasurer repay me \$50,000.
6. My request for \$50,000 repayment was not motivated or in any way connected with gaining eligibility for increased contributions under the millionaire's amendment. I requested partial repayment because the Club for Growth endorsement meant my campaign no longer needed the entire \$140,000 and I desired to be repaid as soon as prudently possible.

25044114603

- 25044114697
7. I did not learn of the FEC requirement that I file a Form 11 until late May 2004. Upon learning of the requirement, I calculated my "notice of opposition personal funds amount" in Form 11 using the actual amount of my loan to the committee, *i.e.*, \$90,000. This has been the amount of my personal expenditures on the campaign since I received partial repayment on my loan on April 23.
  8. I consulted the instructions for Form 11, the regulations, the statute, and Appendix F of the May 2004 FEC Guide for guidance. I also called a Washington-based attorney familiar with election law for informal advice.
  9. The attorney stated that he believed that using current levels of personal expenditures in calculating Form 11 was sensible. He further indicated that the intent of the millionaire's amendment was assist candidates who qualified based on the level of their actual personal expenditures.
  10. On or about June 10, I called the FEC to speak with the senior FEC campaign finance specialist assigned to my campaign on the proper way to complete Form 11. She was not available, but I consulted with another senior campaign finance specialist. This person expressed neither approval nor disapproval of using the amount of my current actual personal expenditures (versus using a seven-week retrospective) to calculate the OPF amount on Form 11.

  
BRAD SMITH

STATE OF MICHIGAN                    )  
  )ss  
COUNTY OF WASHTENAW            )

On September 14, 2004, BRAD SMITH appeared before me and subscribed and swore to the foregoing statements.

  
Notary Public  
Washtenaw County, Michigan

My commission expires: \_\_\_\_\_

September 14, 2004

SHIRLEY L. GOODMAN  
NOTARY PUBLIC WASHTENAW CO., MI  
MY COMMISSION EXPIRES Jun. 16, 2007  
*Acting in Washtenaw County*

AA01\133013 1  
ID\BLS